UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 19

LOURDES HOSPITAL LLC D/B/A LOURDES COUNSELING CENTER[1]

Employer

And **Case 19-RC-262408**

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 21, AFFILIATED WITH THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Petitioner

DECISION AND ORDER

On June 30, 2020, United Food and Commercial Workers Local 21, affiliated with the United Food and Commercial Workers International Union ("Petitioner") filed a petition seeking to represent certain employees of Lourdes Hospital LLC d/b/a Lourdes Counseling Center ("Employer"). Specifically, the Petitioner seeks to add by an *Armour-Globe* self-determination election a classification of unrepresented employees to an existing unit. After the Region issued a Notice of Hearing, the parties subsequently entered into a Stipulation for Pre-Election Hearing ("Stipulation") on about July 24, 2020 and waived their rights to a pre-election hearing before a Hearing Officer. Thereafter, the parties were given leave to file their respective Statements of Position on the remaining issues.

The remaining issues to which the parties were unable to stipulate, are:

1. whether *Sonotone* requires certain professional employees in the existing unit be afforded the opportunity to vote in the election, and

2. whether the election should be conducted manually or by mail-ballot.

[1] The parties stipulate, and I find, that the petition and other formal documents in this matter should be amended to reflect the correct legal name of the Employer.

For the reasons set forth below, I find that the holding of an election at this time is time-barred and therefore dismiss the petition.

THE EMPLOYER'S OPERATIONS AND BARGAINING HISTORY

The parties stipulated that the Employer provides acute inpatient and outpatient psychiatric services in Richland, Washington.

On December 27, 2019, in Case 19-RC-251868, the Petitioner was certified as the exclusive collective-bargaining representative of the employees in the following unit (the existing unit):

> **Included**: All full-time and regular part-time employees in the following classifications employed by the Employer and working at its adult psychiatric and transitions inpatient units in its 1175 Carondelet Dr., Richland, Washington location: registered nurses, case managers — social services, mental health professionals, therapeutic recreational therapists, mental health aides, mental health counselors, health unit coordinators, and secretaries;
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> **Excluded**: all other employees, managerial employees, confidential employees, and guards and supervisors as defined by the Act.

In Case 19-RC-251868, the professional employees had voted for inclusion with the nonprofessional employees in a unit for the purposes of collective bargaining.[2] The stipulated election was held at the Employer's facility on December 19, 2019.

THE INSTANT PETITION

The Petition in the instant case seeks to add by a self-determination *Armour-Globe* election the following classifications of professional and nonprofessional employees (the petitioned-for unit) of the Employer to the existing unit.[3]

The parties stipulated, and I so find, that the classifications below designated as professional employees fall under such designation in that they are professional employees within the meaning of § 2(12) of the Act as their work requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of instruction and

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[2] Registered nurses working as charge nurses were neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the parties did not agree on the inclusion or exclusion of registered nurses working as charge nurses but agreed to vote them subject to challenge. Resolution of their inclusion or exclusion in the existing unit was unnecessary because their ballots were not determinative of the election results. Per-diem employees were not at issue in this case.

[3] *See Globe Machine & Stamping* Co., 3 NLRB 294 (1937) and *Armour &* Co., 40 NLRB 1333 (1942).

study in an institution of higher learning, and that their work is predominantly intellectual and varied in character as opposed to routine, mental, manual, mechanical, or physical.

The parties stipulated, and I so find, that the classifications below designated as non-professional employees fall under such designation in that they are not professional employees within the meaning of § 2(12) of the Act. The following two voting groups of petitioned for classifications are appropriate for the purposes of collective bargaining as part of the existing unit described above, within the meaning of Section 9(b) of the Act:

VOTING GROUP - A (PROFESSIONAL):

Included: All per diem registered nurses and mental health professionals employed by the Employer and working at its adult psychiatric and transitions inpatient units in its facility located at 1175 Carondelet Dr., Richland, Washington.

Excluded: All non-professional employees, all other employees, confidential employees, managerial employees and guards and supervisors as defined by the Act.

VOTING GROUP - B (NON-PROFESSIONAL):

Included: All per diem non-professional employees in the following classifications employed by the Employer and working at its adult psychiatric and transitions inpatient units in its 1175 Carondelet Dr., Richland, Washington location: mental health aides and mental health counselors.

Excluded: All professional employees, all other employees, managerial employees, confidential employees, and guards and supervisors as defined by the Act.

The parties stipulated, and I so find, that the voting groups sought are identifiable, distinct segments of the workforce and that the petitioned-for employees share a community of interest with the existing unit. The parties further stipulated, and I further find, that there is no history of collective bargaining between these parties in the proposed bargaining unit identified above and there is no contract or other bar in existence to an election in this case.

Based upon the foregoing stipulation of the parties, I find that an *Armour-Globe* self-determination election would be appropriate in this case where the Petitioner seeks to add a group of unrepresented employees to an existing unit, inasmuch as an *Armour-Globe* election determines not only whether the employees wish to be represented, but also whether they wish to be included in the existing unit. *Warner Lambert,* Co., 298 NLRB 993 (1990).

As noted above, the sole issue remaining regarding the petitioned-for unit is whether a *Sonotone* election is required to determine whether certain professional employees in the existing unit be afforded the opportunity to vote in the election.

APPLICABLE STATUTORY MANDATE AND BOARD LAW

The parties have stipulated that the petitioned-for unit consists of both professional and non-professional employees. The term "professional employee" is defined in Section 2(12) of the Act of as follows:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
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> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).[4]

Section 9(b)(1) of the Act prohibits the inclusion of professional employees in a unit with employees who are not professional, unless a majority of the professional employees vote for inclusion in such a unit. To carry out the statutory requirement, the Board has adopted a special type of self-determination procedure in a specific self-determination election known as a *Sonotone* election, so named after the lead case, *Sonotone Corp.*, 90 NLRB 1236, 1241-1242 (1950).[5]

In *Leedom v. Kyne,* 249 F.2d 490, 492 (D.C. Cir. 1957), the District of Columbia Court of Appeals construed the above limitation in Section 9(b)(1) as intended to protect professional employees and held that the professionals' right to this benefit does not depend on Board discretion or expertise and that denial of this right must be deemed to result in injury. The United States Supreme Court affirmed this ruling at 358 U.S. 184 (1958).[6]

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[4] *See* NLRB Outline of Law and Procedure in Representation Cases (NLRB Outline), Sections 18-110 and 21-400 (June 2017)

[5] *See also Barnes-Hind Pharmaceuticals, Inc.*, 183 NLRB 301, 303 (1970); *Firestone Tire & Rubber Co.*, 181 NLRB 830, 833 (1970); *New England Telephone & Telegraph Co.*, 179 NLRB 527, 529–530 (1969).

[6] Not only does the Board lack discretion to deny a *Sonotone* election where a unit of professional and non-professionals is sought, but when the Board has sufficient information to put it on notice that there is an issue as to the professional status of employees, it must conduct an inquiry *sua sponte* and cannot rely on the failure of the parties to raise the issue. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999). *See also Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999) (finding region had been put on notice of professional employee status issue and remanding for hearing to take evidence to determine whether *Sonotone* election should have been held).

Thus, because of the proscription contained in Section 9(1)(b), *Sonotone* elections must be directed in two voting groups: the first group includes all employees including professionals, and the second, professional employees alone. The ballots for professional employees ask two questions: (1) whether they desire to be included in a group composed of nonprofessional employees, and (2) their choice with respect to a bargaining representative. If the professionals answer "Yes" to the first question, their votes are then counted with those of nonprofessionals. If the answer is "No," then their votes are counted separately to decide which labor organization, if any, they wish to select to represent them in a separate unit. If a majority of the professionals express a desire to be included with the nonprofessionals, they would be so included and their votes counted together with those of the nonprofessionals. But if they vote against inclusion, their votes would be separately counted to determine whether they wished to be represented by the union. *Minneapolis Society of Fine Arts*, 194 NLRB 371 (1972). If a majority in the voting group vote for the petitioner *and* for inclusion in the existing union, that will be the appropriate unit. If a majority vote for the petitioner but against inclusion in the existing unit, they will constitute a separate unit. Finally, if they vote against the petitioner, they will remain unrepresented irrespective of the outcome of the first question. *Chrysler Corp.*, 192 NLRB 1208 (1971).[7]

Finally, the Board requires that there be a *Sonotone* election each time that there is an election in which professionals and nonprofessionals may be included in the same unit. Thus, subsequent *Sonotone* elections are required in the same unit regardless of whether the professionals have already voted for inclusion in the overall unit. *American Medical Response, Inc.*, 344 NLRB 1406 (2005) (herein cited as *AMR*).

The Employer's Position on a *Sonotone* Election

The Employer argues that *Sonotone* requires an election among the professionals in the existing unit to determine if they wish to be included in the instant unit along with non-professionals.

The Employer submits that denying all professionals, including those in the existing unit, the opportunity to vote violates the requirements of Section 9(1)(b) of the Act. Specifically, the Employer argues that *AMR, supra* holds for the proposition that "even if a group of professionals elects at one point to be a part of a specific mixed unit by adding a new group of professional and non-profession employees via an *Armour-Globe* election, all professional employees (those in the current mixed unit and the new professionals the union seeks to add) must be afforded their right to vote to determine whether they want to be part of the new mixed unit."

In support of this proposition, the Employer asserts that the per-diem employees that the Petitioner now seeks to accrete to the existing unit via an *Armour-Globe* election were excluded

[7] *See* NLRB Outline supra at Section 18-110 and 21-400.

as "all other employees" from the initial unit by stipulation and therefore the professionals in the existing unit were not afforded the opportunity to vote on whether they wanted to have a unit of all professionals that would include those per-diem that the Petitioner now seek to include. The Employer concedes that while it is not possible to speculate how the professionals in the existing unit might have voted if presented with the choice of having per-diem professionals in a separate unit or joining a combined unit with full-time and per-diem non-professionals. However, the Employer argues, such futile speculation militates in favor of a *Sonotone* election to allow the professionals in the existing unit the opportunity to vote on whether they want to be part of a newly-configured unit that was not presented to them in the first election.

In arguing for having the professionals in the existing unit vote in the *Sonotone* election, the Employer urges that the law is "absolutely clear" that professionals are not locked into "a choice they made at a different time, under different circumstances, and involving a different mixed unit."

Moreover, the Employer asserts that inasmuch as it would violate the Act to conduct a *Sonotone* election in only the petitioned-for unit, and an election bar exists with regard to the professional employees in the existing unit who already voted in a *Sonotone* election on December 19, 2019, the petition should be dismissed since these two conflicting mandates cannot be reconciled.

The Petitioner's Position on a *Sonotone* Election

The Petitioner takes the position that the Act does not require the professional employees in the existing unit to vote in the instant *Armour-Globe* election. While acknowledging the proscriptions of Section 9(b)(1) of the Act, the Petitioner argues that the professional employees in the existing unit have already been afforded their statutory right to vote on whether they wish to be included in a unit with non-professional employees and whether they wish to be represented by the Petitioner. As such, the Petitioner urges, the case is distinguishable from Board decisions such as *AMR*, *supra*, because in that case, the professionals involved had never voted on whether they wanted to be represented by a different union petitioning a mixed unit.

The Petitioner further argues, in accord with the Employer, that the professionals in the existing unit are time-barred from voting in another election held within 12-months of the previous election that resulted in certification of the existing mixed unit.

ANALYSIS AND CONCLUSION

This case appears to present a novel issue regarding the interpretation of Board statutory and case law. However, after full and careful consideration of the parties' arguments in support of their respective positions, I have concluded that the Employer has the better argument.

The Petitioner's argument that the professionals in the existing unit are allowed only one *Sonotone* election fails because it appears to contradict the holding in *AMR, supra*, wherein the Board stated:

> The judge's conclusion that a *Sonotone* ballot was not necessary in this election was based on the assumption that professional employees need only have one opportunity to vote on inclusion in a mixed professional/nonprofessional unit. However, that assumption is inconsistent with the Board's decision in *Westinghouse Electric Corp.*, 116 NLRB 1545, 1547 (1956). In that case, the Board rejected the argument that separate *Sonotone* balloting was unnecessary because the professionals had, 6 years earlier, "already enjoyed the statutory privilege" of separately expressing their desire to be included in a mixed professional/nonprofessional unit: "[t]here is nothing in the statute limiting the privilege thus accorded to professional employees to a single opportunity in the course of their employment for a particular employer. Nor do we perceive anything in the statutory language which frees the Board, in its unit determinations, from the limitation imposed by Section 9(b)(1) after it has once conformed to it with respect to any particular group of professional employees."
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> This principle was reaffirmed in *Westinghouse Electric Corp.*, 129 NLRB 846, 848 (1960) ("Section 9(b)(1) of the Act precludes the Board from joining in a single bargaining unit professional and nonprofessional employees, without first affording to the professional employees [an] opportunity to separately express their desires respecting such inclusion. This is so whether or not the professional employees have, on a prior occasion, been afforded such opportunity.") 344 NLRB at 1408. (emphasis added)

While it is true that the nurses in *AMR* had never had the opportunity to express whether they wished to be represented by a different union in a mixed professional/nonprofessional unit, this factor was acknowledged only in a footnote by the Board as an additional factor militating the need for a new *Sonotone* election. 344 NLRB at 1048 fn.8. Rather, the Board in *AMR* stated that a *Sonotone* election is required whenever a group of professional employees is implicated. Thus, I reject the Petitioner's argument, as did the Board in *AMR, supra*, that professional employees are to be afforded only one opportunity to vote on whether they wish to be included with a unit of non-professional employees, particularly inasmuch as the non-professional employees in the petitioned-for unit differ from those in the initial unit.

The Petitioner further asserts that the instant case implicates the Board's certification bar rule which provides that no election challenging a union's representational status among a newly certified unit will be held for a period of one year . See e.g., *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, enfc. 939 F.2d 402 (6th Cir. 1991). Specifically, the Union argues that the existing unit in this case was certified on December 27, 2019. If professional employees are

allowed to vote again and asked whether they want to be represented by the Union, such a procedure would allow an "electoral challenge to [the Union's] representation status prior to the expiration of the one year certification period which is inconsistent with the Board's rule."

The parties are correct with regard to the election bar issue. Section 9(c)(3) of the Act prohibits the holding of an election in any unit or subdivision thereof in which a valid election has been held withing the preceding 12-month period. While the professional employees in the existing unit voted on December 19, 2019 as to whether they wanted to be represented by the Petitioner in a mixed unit, the Petitioner now seeks to potentially combine these employees with other professionals and non-professionals in the petitioned-for unit. *AMR, supra*, suggests that these professionals are now entitled to make the self-determination as to whether they want to be represented by the Petitioner in an accreted unit though a *Sonotone* election. Thus, *AMR* seems to preclude the Board from including the professionals in the existing unit in an accreted unit with non-professional without such an election, even though these employees had been afforded the opportunity to make such a decision in the past. *AMR* 344 NLRB at 1048.

The Employer correctly concludes that there are two mutually-exclusive statutory mandates in conflict here: one provides that the professionals in the existing unit be permitted to participate in a *Sonotone* election to determine whether they wish to be combined in a unit with the non-professionals in the petitioned-for unit, and then whether they wish to be represented by Petition in this new mixed unit. The other mandate, however, precludes the professionals in the existing unit from participating in another election within 12 months of the previous election.

Inasmuch as there is no way to reconcile these two conflicting statutory mandates, I conclude that the instant petition shall be dismissed.[8]

CONCLUSION

Based upon the stipulated record in the case, and after careful consideration of the parties' arguments, I conclude that an election cannot be held at this time. Accordingly, I shall dismiss the instant petition.

Based upon that record and in accordance with the discussion above, I conclude and find as follows:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[9]

[8] Since I am dismissing the petition, there is no need for me to rule on the other remaining issue whether to conduct a manual or mail-ballot election, which is now moot.

[9] The parties stipulated, and I find, that the Employer is a Washington state corporation providing acute inpatient and outpatient psychiatric services in Richland, Washington and that during the past calendar year, a representative period, the Employer's gross revenues from all sales and performance of services exceeded $250,000. During that

2. The parties stipulated, and I so find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the elections on the grounds that it did not file a request for review of this Decision prior to the elections. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations. A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.[10] A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Seattle, Washington on the 11th of August 2020.

Ronald K. Hooks

Ronald K. Hooks, Regional Director
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same time period, the Employer purchased goods and materials valued in excess of $50,000 directly from firms located outside the State of Washington.

[10] On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden.